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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

K.O.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN  
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Real Party in Interest.

D044989

(San Diego County  
Super. Ct. No. SJ11186 A-C)

PROCEEDINGS in mandate after reference to a Welfare and Institutions Code section 366.26 hearing. William E. Lehnhardt, Judge. (Retired Judge of the Imperial County Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)  
  
Petition granted.

Seven-year-old Robert B. and his half-sisters, two-year-old A.O. and eleven-month-old A., were declared dependents of the juvenile court because their mother, K.O., was abusing drugs and engaging in domestic violence with her boyfriend. At the six-month review hearing, the court terminated reunification services and set a Welfare and Institutions Code section 366.26<sup>1</sup> permanency planning hearing.

K.O. seeks writ review (§ 366.26, subd. (l); Cal. Rules of Court, rule 38.1), challenging the juvenile court's findings supporting its termination of services.

We issued an order to show cause, the San Diego Health and Human Services Agency (HHSA) responded, and the parties waived oral argument. We grant the petition and direct the juvenile court to order an additional six months of services to K.O.

#### PROCEDURAL AND FACTUAL BACKGROUND

On October 22, 2003, HHSA took K.O.'s daughters into protective custody because of violence between K.O. and her boyfriend, and K.O.'s methamphetamine use. At the time, Robert was visiting his maternal grandmother in Los Angeles County; he was taken into protective custody on November 4.<sup>2</sup> K.O.'s left eye was bruised, and there were numerous bruises on her arms. Also, K.O.'s right cheek under her eye was swollen. K.O. admitted using methamphetamine during the previous two months.

K.O.'s home was filthy and smelled horribly. The social worker observed rotting food and dirty diapers filled with feces.

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Neither Robert's father nor the girls' father is a party to this writ proceeding.

On October 30 HHSA filed dependency petitions on behalf of the three children alleging they were at substantial risk of harm because of K.O.'s substance abuse during the previous two months and a domestic violence incident on October 18.<sup>3</sup>

On December 18 the juvenile court sustained the petitions and ordered K.O. to comply with her case plan, which required her to complete domestic violence and parenting programs, participate in individual counseling, undergo a psychological evaluation, and submit to a substance abuse assessment by the Substance Abuse Recovery Management System (SARMS). The court also advised K.O. that because the children were under three years old or a member of a sibling group that included a child under three years old, the court could limit the reunification services to six months under section 361.5, subdivision (a)(3). The girls were placed in a licensed foster home; Robert was placed in the maternal grandparent's home in Los Angeles County.

In December K.O. became homeless. She last visited her daughters on December 20. K.O. did not enroll in SARMS or start any services.

In January 2004 K.O. was living in Los Angeles and was homeless. On January 20 she called the social worker to set up a appointment the next day, but K.O. did not show up for the appointment. On January 27 K.O. was convicted of obtaining a blank check and being under the influence. On February 20 K.O. was convicted of receiving stolen property. She was incarcerated in a Los Angeles County jail and had a release date in September. Robert visited K.O. in jail at least twice a month.

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<sup>3</sup> The girls' petitions contained a second count, alleging they were exposed to the

The social worker sent K.O. a prison packet in March.

While she was in jail, K.O. participated in the Reach Program, which provided classes on parenting, anger management, problem solving, substance abuse, and the effects of violence and substance abuse on children. K.O. attended classes six hours a day and had completed two of the three segments of the program. K.O. also attended Narcotics Anonymous/Alcoholic Anonymous meetings in jail. The social worker referred K.O. to the Family Recovery Center in Oceanside for services upon her September release from jail.

For the upcoming six-month review hearing, the social worker recommended services be terminated and that a section 366.26 hearing be set.

On August 30 the court held the contested section 366.26 hearing. Social worker Neda Rivera testified her recommendation was based on the fact that after K.O.'s release from jail she would have only three months to comply with her case plan and obtain a job and a place for the children before the 12-month review date. Further, K.O. would have to maintain her sobriety outside of jail. Rivera acknowledged K.O. was making "some" progress with her participation in services offered by the jail, but had not made "substantial progress." Rivera also said there was not a substantial probability that the children could be returned to K.O. by the 12-month review date.

Rivera testified that in her encounters with K.O., K.O. did not take responsibility for her children becoming dependents.

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October 18 domestic violence incident.

K.O. testified that she used to have a negative outlook on life, blaming "the system" and being "mad at the world." She characterized herself at the time as being "prideful," "stubborn" and "rebellious." K.O. learned from the jail Reach Program that the reason she used drugs was to condition herself to be angry rather than feel hurt when bad things happened to her. She now realized that she needed help and was no longer in denial about her problems, including her eight-year use of crystal methamphetamine.

K.O. also learned self-control and to listen before reacting quickly. For example, she learned in the parenting classes to discipline the children without spanking them and to "be consistent with time-out, talking to them and moving them away from the problem that caused me to react."

K.O. testified that as a result of the domestic violence classes she was not going to get involved with a partner when she was released, and she would not do so until she became healthy. At this time, K.O. did not believe she was healthy; rather, she was healing and needed further help. K.O. called herself a "work in progress" who still needed to deal with her stubbornness and learn more self-control. She further explained: "I have been a very angry person for very many years. . . . I know I have been wrong. I know I have been blaming things on others. I can't control others. I can only control myself. I am learning that now. I am not healed yet." K.O. planned to enter the inpatient program at the Family Recovery Center after her release from jail. K.O. estimated it would take a year for her to become healthy enough to take care of her children.

Asked who was responsible for her children being dependents of the court, K.O. responded that she now recognized she was responsible because she put her children in danger.

After noting that K.O. had been candid and forthcoming in her testimony, the court found K.O. had not participated regularly and had not made substantial progress with her case plan. The court found reasonable services had been provided to her, there was not a substantial probability that the children could be returned to K.O. by the 12-month review date, and returning the children to K.O. at that point would create a substantial risk of detriment to their physical and emotional well-being. The court terminated reunification services and set a section 366.26 hearing.

#### DISCUSSION

K.O. contends the juvenile court erred by not continuing her reunification services to the 12-month review date. Specifically, K.O. argues the court erroneously found (1) she had failed to participate regularly and make substantive progress in her case plan, and (2) there was not a substantial probability that the children could be returned to her in the next six months.

A reviewing court must uphold a juvenile court's findings and orders if they are supported by substantial evidence. (*In re Amos L.* (1981) 124 Cal.App.3d 1031, 1036-1037.) We view the record in the light most favorable to the court's order and indulge in all reasonable inferences to support the court's findings. (*In re Luwanna S.* (1973) 31 Cal.App.3d 112, 114.)

At the six-month review hearing, the juvenile court may terminate reunification services and schedule a permanency planning hearing where the child, on the date of removal, was under the age of three years or was a member of a sibling group whose youngest member was under the age of three on the date of the initial removal, if the court finds, by clear and convincing evidence, the parent failed to participate regularly and make substantive progress in the court-ordered plan. (§ 366.21, subd. (e).) If, however, the court finds there is a substantial probability that the child may be returned to the parent within six months or that reasonable services were not provided, the court must continue the case to the 12-month review hearing. (*Ibid.*)<sup>4</sup>

The dispositive question before us is whether there is substantial evidence that K.O. "failed to participate regularly and make substantive progress in a court-ordered treatment plan." (§ 366.21, subd. (e).) We conclude there was not.

The children were removed from K.O.'s custody in October 2003 because K.O. was involved in domestic abuse and was using methamphetamine. On December 18 the court ordered K.O. to comply with her case plan, which required her to complete domestic violence and parenting programs, participate in individual counseling, undergo

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<sup>4</sup> Section 366.21, subdivision (e), reads in pertinent part: "If the child was under the age of three years on the date of the initial removal . . . and the court finds by clear and convincing evidence [at the six-month review hearing] that the parent failed to participate regularly and make substantive progress in a court-ordered treatment plan, the court may schedule a hearing pursuant to Section 366.26 within 120 days. If, however, the court finds there is a substantial probability that the child, who was under the age of three years on the date of initial removal . . . may be returned to his or her parent or legal guardian within six months or that reasonable services have not been provided, the court shall continue the case to the 12-month permanency hearing."

a psychological evaluation, and enroll in SARMS. K.O. did not begin to comply with her case plan in any meaningful way until after she was incarcerated in Los Angeles County. Thus, for four months after her children were taken away from her and for two months after the juvenile court ordered services for her, K.O. made no effort to get her children back. That was time K.O. squandered.

However, after she was convicted of crimes and incarcerated in Los Angeles County, K.O. began to seriously address the problems that caused her children to be removed. K.O. took advantage of the intensive services available through the jail, conscientiously attending and participating in the Reach Program. The parenting education she received was comparable to a parenting course that would meet case plan requirements. The Reach Program also addressed her anger management and domestic violence problems. K.O. also attended Narcotics Anonymous/Alcoholics Anonymous meetings in jail. The only case plan requirements that were not addressed or satisfied were the psychological evaluation and individual counseling, which were not offered in the jail.

Although she initially did not participate in any services and made no progress in her case plan, by the time of the contested six-month hearing, K.O. had turned herself around. During her incarceration, K.O. regularly participated in all services that were available to her, and she made considerable progress in addressing the problems that had caused her children to become dependents. Her testimony demonstrated that she had gained significant insight into those problems. Further, K.O. realized that she had a lot more work to do to get to the point where her children could be safely returned to her.



Neither the court nor HHSA's counsel doubted the sincerity of K.O.'s testimony in those regards. The record belies the notion that K.O. did not make substantive progress while incarcerated.

HHSA argues that K.O.'s participation in services during the short time she had been incarcerated does not constitute regular participation in her case plan and does not demonstrate substantial progress with the provisions of the case plan. However, K.O.'s period of noncompliance with the case plan was two months, while her active participation in the jail's Reach Program took place over six months.

HHSA also argues that there was no proof that K.O. had remained sober while she was in jail because illicit drugs are available in penal institutions and neither the jail nor the Reach Program conducted drug testing. However, there was proof of K.O.'s jail sobriety; she testified under oath that she had been sober since her incarceration, and the court specifically noted that it believed she had been clean during the several months she had been in jail. HHSA further claims that K.O.'s compliance with a program within the structured environment of a jail does not establish that she will remain sober and free of violent relationships in the outside world. However, that point does not go toward whether K.O. regularly participated in services and made substantive progress. Moreover, K.O. planned to enter an inpatient program to continue her rehabilitation after her release from jail and eventually progress to the point that she could safely parent her children.

K.O.'s failure to comply with the case plan requirements of a psychological evaluation and counseling is simply evidence that she has not yet completed every aspect

of the plan. However, nothing in K.O.'s case plan required her to completely finish every aspect during the first six months. The psychological evaluation and counseling requirements can be addressed when she is in the inpatient recovery program.

The fact that K.O. squandered the first two months following the disposition hearing does not obliterate the fact that she regularly and willingly participated in services during the next six months while in jail and made substantive progress during this period. To be sure, K.O. has to continue to make progress if she is going to be reunified with her children. The record indicates K.O. recognized this.

Although the record contains substantial evidence that there was no substantial probability that the children could be returned to K.O. by the next statutory six-month period—or even within the next six calendar months—probability of return is not a determinative issue in this case. The statutory language of section 366.21, subdivision (e) (see fn. 4, *ante*) gives the juvenile court discretion to set a section 366.26 hearing *only if* the parent has not regularly participated and made substantive progress in the court-ordered treatment plan. This discretion to set the 366.26 hearing after only six months of services is further limited by the statute. Even if the parent has *not* regularly participated and made substantive progress in the case plan, the court "shall" provide additional services if the court finds there is a substantial probability the child may be returned within six months. (§ 366.21, subd. (e).) Practically speaking, the import of this probability of return provision is that it has the potential to preclude the court from setting a section 366.26 hearing after only six months of services.

Because the juvenile court erred in finding HHSA met its burden to demonstrate that K.O. had failed to regularly participate and make substantive progress in her case plan, we conclude the court exceeded its authority when it set the section 366.26 hearing. This renders the probability of return issue immaterial to the disposition of this writ proceeding. Accordingly, we need not further address K.O.'s contention that the court should have used a longer timeline in assessing the probability of return, as held in *Dawnel D. v. Superior Court* (1999) 74 Cal.App.4th 393, 399, other than to note that this court specifically rejected the *Dawnel D.* holding in *Jessica A. v. Superior Court* (2004) 124 Cal.App.4th 636, 643-645.)

#### DISPOSITION

Let a writ issue directing the respondent juvenile court to (1) vacate its August 30, 2004 orders terminating reunification services for K.O. and setting the matter for section 366.26 permanency planning hearings, and (2) issue a new order directing HHSA to provide six more months of services to K.O. The stay issued by this court on January 3, 2005 is lifted. This opinion is final immediately as to this court. (Cal. Rules of Court, rule 24(b)(3).)

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IRION, J.

I CONCUR:

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HALLER, Acting P. J.

Aaron, J., dissenting:

The majority concludes that there is not substantial evidence to support the juvenile court's determination that K.O. failed to participate regularly and make substantive progress in her case plan, and thus, that the court erred in terminating her reunification services and scheduling a permanency planning hearing. Because there is, in my view, substantial evidence supporting the juvenile court's findings, I dissent.

A reviewing court must uphold a juvenile court's findings and orders if they are supported by substantial evidence. (*In re Amos L.* (1981) 124 Cal.App.3d 1031, 1036-1037.) As the majority acknowledges, in reviewing the juvenile court's findings, "we must indulge in all reasonable inferences to support the findings of the juvenile court [citation], and we must also ' . . . view the record in the light most favorable to the orders of the juvenile court.'" (*In re Luwanna S.* (1973) 31 Cal.App.3d 112, 114, quoting *In re Biggs* (1971) 17 Cal.App.3d 337, 340.) We are not to reweigh the evidence or evaluate the witnesses' credibility, but rather, we are to defer to the trial court as to these matters. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968; *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) The appellant bears the burden of showing that the evidence is insufficient to support the trial court's findings. (*In re Geoffrey G.* (1978) 98 Cal.App.3d 412, 420.)

K.O.'s case plan required that she participate in a psychiatric evaluation, a substance abuse assessment through SARMS and individual counseling, and that she complete domestic violence and parenting education programs. The record demonstrates

that K.O. did not comply with any of these requirements from October 2003 until she was incarcerated in February 2004. During the time period prior to K.O.'s incarceration, she continued to use drugs, remained in a violent relationship, and was terminated from her residential program because she allowed her boyfriend—a known gang member—to come into the shelter where she was living. It was not until she was incarcerated that she made any effort to comply with her case plan. While K.O. concededly did make some progress in her case plan once she was incarcerated, at the time of the six-month review hearing she had not demonstrated an ability to maintain sobriety outside of the structured environment of the prison, had not participated in a psychiatric evaluation, had not completed domestic violence classes, and had not commenced individual therapy. Indulging all reasonable inferences to support the findings of the juvenile court and viewing the record in the light most favorable to the orders of the juvenile court, as we are required to do, there is, in my view, clearly substantial evidence to support the juvenile court's findings that K.O. failed to participate regularly and make substantive progress in her case plan by the time of the six-month review hearing.

Rather than reviewing the juvenile court's findings to determine whether there is substantial evidence to support them, the majority instead reweighs the evidence and substitutes its judgment for that of the juvenile court in reaching the conclusion that there was not. Because, in my view, there was substantial evidence to support the juvenile court's findings, and because, as the majority observes, there is no substantial probability

the children will be returned to K.O. by the time of the 12-month hearing, I would affirm the judgment of the juvenile court.

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AARON, J.